

Shipping Law

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Apart from the welcome reinstatement of the summary judgment procedure for admiralty actions, the removal of which was lamented in the last review (“Shipping Law” [1999] NZ Law Review 387, 391-393; the High Court Amendment Rules 1999, amending Rule 135 of the High Court Rules, came into effect on 1 January 2000), there have been no noteworthy legislative developments during the period under review. This review will therefore focus on aspects of the recent Shipping Industry Review, and a selection of significant cases decided since the last review.

A Future for New Zealand Shipping?

In August 2000, the Minister of Transport announced a Shipping Industry Review to inquire into the future of the New Zealand shipping industry and make strategic recommendations to the Government. The aim of the review, promised in Labour’s transport manifesto, is to ensure a “fair and competitive shipping policy which will see New Zealanders involved at the maximum possible level in the transport of our import and export products”. The review team’s report, entitled “A Future for New Zealand Shipping” (with a fetching but – given the serious decline of the New Zealand merchant fleet – perhaps overly optimistic cover illustration of a ship’s engine room telegraph set to “full speed ahead”) was completed in December 2000 and made public in March 2001. The report is currently being considered by a special Ministerial Committee which will report its recommendations to Cabinet.

The main finding of the review is that the New Zealand shipping industry is at a serious competitive disadvantage on coastal routes opened up to international operators by the enactment of section 198 of the Maritime Transport Act 1994. The report concludes that the three principal options which will increase New Zealand participation in shipping are cabotage, a second register, and a tonnage tax regime.

The question of whether cabotage should be reintroduced in New Zealand seems to have proved intractable. The review contains a list of some of the economic pros and cons, briefly refers to an economic report it commissioned which concludes that reintroduction of cabotage will increase domestic and international freight costs by a total of \$13.1 million, but then makes no final recommendation (27-28). The review team does, however, recommend that the Government initiate a study on mutual liberalisation of the New Zealand and Australian coasts under CER (40). It is perhaps not surprising that views were divided on the contentious issue of cabotage. However, given the terms of reference, which required a consideration of social and environmental as well as economic factors, the analysis in the report does seem rather superficial and incomplete. As was evident from the Select Committee submissions on section 198 of the Maritime Transport Act,

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concerns about liberalisation of coastal shipping are not based solely on economic ideology but also centre on specific safety, environmental and biosecurity issues. These issues are not addressed in the report.

The review strongly recommends that special tax incentives such as a second register with tax concessions and favourable rates of depreciation, and/or a shipowner-friendly tonnage tax similar to that adopted in the United Kingdom following the Weedon Report (Lord Alexander of Weedon *Independent Enquiry into a Tonnage Tax*, UK Treasury, 1999), be implemented in New Zealand in order to create a “level ocean” for local shipping operators (29-32).

The review further recommends, in light of the “number of submissions and presentations that raised th[is] issue”, that the Commerce Commission investigate alleged anti-competitive practices and monopoly pricing by port companies (37-38). The treatment of this issue may be contrasted with the discussion of regulation of liner conferences (41, 43). International shipping currently enjoys an exemption from the restrictive trade practices and control of price rules in Parts II and IV of the Commerce Act 1986. Instead, outward carriage is regulated by the almost entirely toothless Shipping Act 1987. Given the international trend towards tougher policing of liner conferences, New Zealand’s Shipping Act regime seems increasingly anomalous and unsatisfactory. Despite noting that some submissions argued that liner conference practices might inhibit New Zealand participation in trans-Tasman trade or inflate international freight rates to the detriment of New Zealand exporters and importers, the review concluded that the issue was not specifically within its terms of reference and that priority should instead be given to measures focusing on domestic shipping. If the New Zealand shipping industry wanted to expand into international shipping services in future, the Government “could then give consideration to reviewing the exemption in the Commerce Act 1986”. It is disappointing that the review effectively side-stepped this issue. At the very least, a review of the enforcement provisions of the Shipping Act 1987 to bring them in line with international practice would seem to be overdue.

A further significant recommendation is that the Government ratify International Labour Organisation (ILO) Convention 147 Concerning Minimum Standards in Merchant Ships 1976, which would require New Zealand to enforce minimum safety, social security, employment and living arrangement standards, not only in respect of New Zealand ships and crews, but also in respect of seafarers on any foreign ships calling at New Zealand ports, regardless of whether they are flagged in a Convention state. Currently, such standards are directly enforced in respect of New Zealand ships only: see sections 6-16 of the Maritime Transport Act 1994. Crews of foreign ships have to rely on flag state enforcement of standards, which may prove to be cold comfort. Convention 147 is an “umbrella Convention”, which requires states to be parties to the International Convention for the Safety of Life at Sea 1974 (SOLAS), the International Convention on Load Lines 1966 and the Convention on the International Regulations for Preventing Collisions at Sea 1972. In addition, states have to demonstrate domestic compliance with 11 listed ILO Conventions. New Zealand has had difficulties with the two freedom of association and collective bargaining Conventions (Nos 87 and 98). Following the repeal of the Employment Contracts Act 1991 and the enactment of the Employment Relations Act

2000, however, the ILO is apparently reviewing New Zealand's status. The Government will hopefully implement this recommendation as soon as practicable.

The Shipping Industry Review makes some very useful observations and recommendations. Given that New Zealand is likely to remain a nation of shippers rather than carriers, however, it is a pity that its terms of reference did not extend beyond *participation* in the shipping industry, to the *effects* on New Zealand importers and exporters of current and future trends in the international shipping industry. A broader, better-funded, more in-depth examination of the future of New Zealand's international trade would seem to be called for.

Burden and Standard of Proof

In *Vostok Shipping Co Ltd v Confederation Ltd* [2000] 1 NZLR 37, the Court of Appeal once again addressed the question of burden and standard of proof in an application to set aside an admiralty arrest. *Vostok* involved an appeal from the decision of Laurenson J in *Vostok Shipping Co Ltd v The Ship "Kapitan Lomaev"* (HC Auckland, AD 907, 10 September 1998) to set aside the vessel's arrest, where his Honour held that the burden of proof rested on the applicant shipowner (Confederation) to establish the "jurisdictional fact issues" on which it relied in order to satisfy the Court that the plaintiff (*Vostok*) had no arguable case.

As discussed in "Shipping Law" [1999] NZ Law Review 387, 395-396, Laurenson J's approach to this issue, and the line of authorities on which it was based (*Marine Expeditions Inc v The Ship "Akademik Shokalskiy"* [1995] 2 NZLR 743; *Sovrybflot v The Ship "Efim Gorbenko"* [1996] 2 NZLR 727; *Mobil Oil New Zealand Ltd v The Ship "Rangiora"* [2000] 1 NZLR 49), seemed to be irreconcilable with the approach that the Court of Appeal had earlier adopted in *Baltic Shipping Co Ltd v Pegasus Lines SA (The Samarkand)* [1996] 3 NZLR 641.

On appeal, the Court of Appeal reaffirmed its support for its earlier decision in *The Samarkand* and confirmed that this approach is to be applied to jurisdictional issues arising under both sections 4 and 5 of the Admiralty Act 1973. Thus, on an application to set aside arrest, the plaintiff rather than the applicant shipowner is required to prove on a balance of probabilities that the proceeding is within the admiralty in rem jurisdiction. The Court noted that this approach is "now firmly entrenched" in England (*The Aventicum* [1978] 1 Lloyd's Rep 184; *The Nazym Khikmet* [1996] 2 Lloyd's Rep 362), has been followed in Singapore (*The Andres Bonifacio* [1993] SLR 521) and Australia (*The Owners of the Ship "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404) and should be followed in New Zealand as well.

The Court agreed with the view of Robert Goff J in *I Congreso del Partido* [1978] 1 All ER 1169 that matters going to jurisdiction must be dealt with on the motion to set aside the arrest, and cannot be left to be determined as an issue in the substantive proceedings. It is therefore not enough for the plaintiff merely to raise an arguable case as to jurisdictional issues, leaving the final resolution of these issues to the proceedings; the court must *first* decide whether it is vested with, and will exercise jurisdiction, *before* the action should be allowed to proceed. It is difficult to fault the logic of this approach; but it can create practical difficulties, especially in the context of admiralty actions, which are often brought as a matter of urgency and may involve complex factual and legal issues. Indeed, the very nature of the statutory in rem jurisdiction, which is typically defined by reference to a "shopping list" of substantive claims (section 4 of the Admiralty Act 1973) and a substantive ownership or control requirement (section 5(2) of the Admiralty Act), greatly increases the likelihood that preliminary jurisdictional disputes will involve complex substantive issues.

The Court responded to these concerns by confirming that, whilst jurisdictional issues must be decided on the motion to set aside, they should be decided on evidence and not merely on the pleadings. The Court could not see why an application to set aside the arrest should not be adjourned to give time for the necessary evidence to be assembled

and, if necessary, for deponents to be brought to New Zealand for cross-examination so that important factual issues going to jurisdiction could be determined “without undue haste and consequent prejudice to a party which perhaps may not have immediate access to all relevant factual materials”.

The Court of Appeal’s judgment in *Vostok* clarifies and settles the general rules on burden and standard of proof in admiralty actions. There are likely to be ongoing skirmishes, however, over exactly which “jurisdictional fact issues” the plaintiff is required to prove in respect of specific heads of admiralty jurisdiction.

Choice of Law and Beneficial Ownership

A further important aspect of the Court of Appeal’s judgment in *Vostok* is its consideration of choice of law in determining the crucial issue of beneficial ownership under section 5(2)(b) of the Admiralty Act 1973. Section 5(2)(b) provides that, “where the person who would be liable on the claim in the action in personam was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship”, an action in rem may be brought against that ship “if, at the time when the action is brought, it is beneficially owned as respects all the shares therein by, or is on charter by demise to, that person”. Here, the crisp question was whether beneficial ownership should be determined according to Russian law or New Zealand law.

Vostok concerned an action in personam brought against a Russian company, Orka, and an action in rem brought against the *Kapitan Lomaev* for goods and services supplied to the ship. Confederation applied to have the action in rem set aside on the basis that it, and not Orka, was the beneficial owner of the ship when the action was brought. It seems that Orka agreed to transfer the ship to Confederation, a nominee and apparently a subsidiary of Prok Bank (a Russian bank incorporated in Vanuatu), to settle Orka’s debts to Prok Bank. The transfer agreement was entered into while the ship was on the high seas. Confederation thereafter took possession of the ship, which was then provisionally registered on the Belize registry. Permanent registration, which was subject to production of evidence that the vessel had been removed from the Russian register, was not finalised until after the ship’s arrest.

Which law should determine the issue of beneficial ownership? *Vostok*’s counsel characterised the issue as involving the proprietary consequences of the transfer agreement, and argued that it should therefore be determined by the *lex situs* at the time of the transfer. Since the vessel was on the high seas at the time of transfer, the *situs* should be deemed to be the ship’s port of registry, and the *lex situs* was thus Russian law. This argument accords with established conflicts principles: see *Hooper v Gumm* (1867) LR 2 Ch App 282, 290; L Collins (ed) *Dicey & Morris Conflict of Laws* (13 ed, Sweet & Maxwell, London, 2000), vol 2, 936-937, stating that the rule deeming a ship to be situated at her port of registry “would seem to be both convenient and sound in principle when the vessel is upon the high seas”. *Vostok*’s expert evidence stated that the requirements for a successful alienation of property under Russian law had not been complied with until after arrest. *Vostok*’s counsel argued that the ship was therefore still beneficially owned by Orka when the action in rem was brought. Confederation’s expert evidence on Russian law, however,

was to the contrary effect, stating that the requirements for a transfer of ownership had been met before the action was commenced.

Confederation's counsel, however, submitted that the issue should instead be determined by reference to the *lex fori*, New Zealand law, in terms of which it was common ground that Confederation was regarded as having become the equitable or beneficial owner before the ship arrived in New Zealand. It was argued (at 45) that "when a dispute is properly characterised as relating to the jurisdictional requirements to bringing an action, then choice of law rules are not relevant". In support of this argument, counsel cited the majority opinion of the Privy Council in *Bankers Trust International Ltd v Todd Shipyards Corporation (The Halcyon Isle)* [1981] AC 221, 235, where Lord Diplock said that "the question of the right to proceed in rem against a ship as well as the priorities in the distribution between competing claimants of the proceeds of her sale ... falls to be determined by the *lex fori*, as if the events that gave rise to the claim had occurred in [the forum country]". Counsel further noted that the Singapore Court of Appeal in *The Andres Bonifacio* had rejected an argument that the issue of beneficial ownership should be determined by the *lex situs* instead of the *lex fori*.

The Court held that Laurenson J had been entitled to prefer Confederation's expert evidence on Russian law, and the outcome of the case would therefore be the same regardless of whether the issue of beneficial ownership was determined by the *lex situs* or the *lex fori*. Nonetheless, the Court (at 45-46; see also 48 per Gault J) expressed strong obiter support for a species of *lex fori* approach in the following terms:

[A]s the issue of ownership goes to a condition precedent to the jurisdiction of the New Zealand Court, it falls to be determined under New Zealand law. That issue does not arise in the substantive proceeding, if and when jurisdiction is established. A question of the right to invoke jurisdiction can also be seen as a matter of procedure and as such governed by the *lex fori*. New Zealand law necessarily has to look to the Russian register as a means of beginning the process of determining the ownership of the ship, for the register is the root of title. The proper approach ... is broadly that which was followed by the English Court of Appeal in *The "Nazym Khikmet"* which is to ask whether under the law to which a company operating the ship was subject (Ukrainian law) it was what English law would regard or recognise as the beneficial owner of all the shares in the vessel.

The Court of Appeal's approach in *Vostok* (as that of the Courts in *The Nazym Khikmet* and *The Andres Bonifacio*) seems to be heavily influenced by Lord Diplock's reasoning in *The Halcyon Isle*. It should be born in mind that, on a proper analysis of the facts in *The Halcyon Isle*, jurisdiction was not at issue. What was at issue was whether the United States shiprepairer's claim should enjoy priority over the mortgagee's claim. This, in turn, depended on whether the maritime lien status of the shiprepairer's claim under the *lex causae* (US law) should be recognised by the forum. The minority approach correctly characterised the latter issue of recognition of maritime lien status as a choice of law issue involving substantive rights, which should therefore be determined by the *lex causae*. As we have seen, however, the majority was of the view that both issues were subject to the *lex fori* on the ground that they were both jurisdictional and therefore both procedural issues. As Jackson (*Enforcement of Maritime Claims* (2 ed, LLP Ltd, London,

1996) 602) points out, the reasoning of the majority in *The Halcyon Isle* is conceptually flawed:

The argument relied on by the majority that the proprietary characteristics of a maritime lien (in its enforceability against purchasers and the question of its creation) are matters of jurisdiction seems to confuse an issue of whether a right (a matter of substance) exists with whether a court can adjudicate on whether it can exist (a matter of jurisdiction). Even if an English court is directed by a mandatory statutory rule that only those claims attracting maritime liens in English domestic law *can* be recognized in English proceedings as attracting such liens this is a matter of choice of law and not jurisdiction. At the least, it leads to a lack of clarity to confuse the nature of rights with the power to decide on their existence.

The Court's approach in *Vostok* seems to be founded on a similar confusion of the substantive choice of law issue of whether Orka or Conderation enjoyed rights of beneficial ownership over the vessel and the issue of whether the court had jurisdiction under section 5(2)(b) of the Admiralty Act. As Jackson notes (at 602 n 186), this confusion and conflation of issues is encouraged by the statutory framework of the admiralty jurisdiction, which intermingles concepts of substantive rights, procedure and enforcement. This makes it even more important to maintain careful conceptual distinctions.

Secondly, the Court's approach either fails to recognise the issue of beneficial ownership as an incidental choice of law question altogether, or assumes that, because the principal issue before the court relates to jurisdiction, all incidental questions must therefore also necessarily be characterised as procedural and be determined by the *lex fori* (to similar effect, see Toh, *Admiralty Law and Practice* (Butterworths, Singapore, 1998) 107, commenting on *The Andres Bonifacio*: "It is axiomatic that all questions of jurisdiction are governed by the *lex fori*.") Such an approach is inappropriate in terms of general conflicts theory and policy. Even though the primary issue (determining the court's jurisdiction) is clearly procedural and therefore subject to the *lex fori*, its resolution is dependent on an incidental question (beneficial ownership) which, if analysed in its own terms, clearly raises substantive choice of law issues, and should therefore be decided by reference to the *lex causae* rather than the *lex fori*.

Thirdly, the Court's approach would also seem to be inconsistent with the treatment of analogous jurisdictional issues in the general civil jurisdiction. For example, when deciding whether it has jurisdiction based on service under Rule 219, a court will have regard to foreign law in analysing any incidental questions which may arise in its examination of Rule 219. So, if jurisdiction is said to be based on service under Rule 219(3)(iii), where a foreign contract to which the proceedings relate was to be performed in New Zealand, a court will examine the proper law of that contract to determine its effect (the incidental question), in order to establish whether it has jurisdiction pursuant to Rule 219 (the primary jurisdictional issue). Similarly, if jurisdiction is said to be based on Rule 219(a), where a foreign tort has been committed with resultant loss or damage suffered in New Zealand, appropriate regard will be had to foreign law in applying the usual choice of law rule to that tort (for consideration of foreign law in relation to incidental questions raised by Rule 219 see eg *McConnell Dowell Constructors Ltd v Lloyd's Syndicate* 396 [1988] 2 NZLR 257 (CA); *Club Mediterranee NZ v Wendell* [1989] 1 NZLR 216 (CA); *Society of Lloyd's*

& Oxford Members' Agency Ltd v Hyslop [1993] 3 NZLR 135 (CA); and see further *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] QB 391 (CA)).

Fourthly, it seems to me that the Court's approach fails to take into account the purpose of section 5(2)(b) of the Admiralty Act 1973. In terms of the procedural theory of admiralty jurisdiction (which to a large degree underpins the admiralty jurisdictions of all Anglo-Common Law countries) the purpose of an admiralty action in rem is not so much to pursue the res itself, but rather to use the action in rem to secure the appearance of the appropriate defendant. If the defendant does not enter an appearance, the action in rem proceeds against the ship only. If, however, the defendant does enter an appearance, the action automatically proceeds as both an action in rem and in personam: see eg *King v The Ship "Grey Gull"* (HC Auckland AD 467/87; CP 26/90, 2 March 1993, Tompkins J); *Bank of Nakhodka v The Ship "Abruka"* (1996) 10 PRNZ 219; *International Factors Marine (Singapore) Pte Ltd v The ship Komtek II* [1998] 2 NZLR 108. (Indeed, under the more extreme version of the procedural theory espoused by Lord Steyn in *Republic of India v India Steamship Co Ltd (The Indian Grace (No 2))* [1998] AC 878 (HL), the owner is deemed to be a party to the action in rem from the moment that the jurisdiction is invoked.) This is precisely why section 5(2)(b) of the Admiralty Act requires a sufficient link of ownership or control between the person who would be liable in personam and the ship against which the action in rem is brought. Section 5(2)(b) is a sifting and matching mechanism which ensures that an action in rem can only be brought against a ship which is linked to the appropriate defendant. This mechanism will only function correctly if the issue of beneficial ownership on which it relies is not distorted by a blanket application of the *lex fori*. A failure to apply correctly section 5(2)(b), or the factors such as beneficial ownership on which it is based, will necessarily affect the integrity of admiralty proceedings where the defendant enters an appearance or where there are concurrent proceedings in rem and in personam, and may give rise to unjust and absurd results.

This can be illustrated by a simple hypothetical example. A ship is owned by X according to the *lex situs* but it would be regarded as being owned by Y under the *lex fori*. The plaintiff has a maritime claim against Y. It may, on the analysis in *Vostok*, bring an action in rem against the ship, despite the fact that X is regarded as the owner under the *lex situs*. What is the position if X, rather than protesting the jurisdiction, enters an appearance as the defendant owner and denies liability in respect of the claim? Could the court refuse to accept that X is the owner (and therefore the appropriate defendant) by continuing to apply the *lex fori* to the ownership issue? It would seem not; as jurisdiction has already been established, the court would now have to decide ownership of the ship as a substantive choice of law issue under the *lex situs*. The court would then have to acknowledge that it has "got the wrong ship", in the sense that, while Y may be the owner of the ship at the *lex fori* "for jurisdictional purposes", X is the owner in the real world and is simply not liable on the claim. Or the court would have to turn its back on the procedural theory altogether and opt for a confiscation of X's property based solely on the ownership criteria of the *lex fori*. Such an outcome would be totally unprecedented, manifestly unjust and unproductive of international uniformity.

For the above reasons, it seems clear to me that the *lex causae* (here, the *lex situs*) rather than the *lex fori* should have been applied to determine the preliminary issue of

beneficial ownership and any other substantive incidental questions arising under the Admiralty Act.

There would seem to be two general morals to this tale. First, the conflicts reasoning of the majority in *The Halcyon Isle* is deeply problematic and should not be adopted by our courts, still less extended beyond the parameters of the original decision. (This view would seem to be shared by the New Zealand legislature: see section 70 of the Ship Registration Act 1992, which reversed the application in *The Ship "Betty Ott" v General Bills Ltd* [1992] 1 NZLR 655 (CA) of the majority reasoning in *The Halcyon Isle* to foreign ship mortgages and introduced a statutory choice of law rule designed to have the same effect as the minority approach in *The Halcyon Isle*.) Second, in the admiralty jurisdiction, as in other areas of law, categorisation of conflicts issues should be undertaken with due regard to the policy considerations informing New Zealand private international law, which exists "to fulfil foreign rights, not to destroy them" (PM North, JJ Fawcett *Cheshire & North's Private International Law* (13 ed, Butterworths, London, 1999) 69), and in a spirit of pragmatism and common sense.

Forfeiture

In *Kareltrust v Wallace & Cooper Engineering (Lyttelton) Ltd* [2000] 1 NZLR 401 (hereinafter referred to as *Wallace & Cooper*) and *Karelrybflot AO v Udovenko* [2000] 2 NZLR 24 (hereinafter referred to as *Udovenko*), two contemporaneous decisions of the same five-man bench of the Court of Appeal, the Court made some important statements about the effect of forfeiture on pre-existing maritime liens and statutory rights of action in rem, and the admiralty jurisdiction over seafarers' wages claims.

Both appeals arose from the forfeiture to the Crown in February 1998 of five vessels, the *Orlovka*, the *Osha*, the *Om*, the *Olenino* and the *Ognevka* under section 107B(2) of the Fisheries Act 1983 as a result of quota management offences committed by their New Zealand charterer, Abel Fisheries Ltd. The vessels were owned by Karelrybflot, a Russian fishing company. In April 1998, Karelrybflot entered into an agreement with another Russian company, Kareltrust, in contemplation of the Minister of Fisheries' releasing the vessels to Karelrybflot under section 107C(2) of the Fisheries Act. In terms of this agreement, Kareltrust would provide the funds to pay the redemption price to the Minister and any sum payable to the crews of the vessels. In return, title to the ships would pass to Kareltrust immediately on redemption of the vessels to Karelrybflot. In June 1998 the ships were released to Karelrybflot under section 107C(2) for payment to the Crown of \$500,000.

Wallace & Cooper subsequently brought actions in rem under section 4(1)(l) of the Admiralty Act 1973 against the first four ships mentioned above, and in personam against Karelrybflot for work carried out on the vessels prior to forfeiture. Kareltrust filed a conditional appearance and sought an order that the actions in rem be set aside or struck out, on the ground that it, and not Karelrybflot, was the beneficial owner of the ships at the time when the actions were brought, and that the requirements of section 5(2)(b) of the Admiralty Act had therefore not been met.

In the High Court, Young J held that the plaintiff's statutory claims *in rem* had survived forfeiture to the Crown. In doing so, he distinguished the earlier decision of the Court of Appeal in *Equal Enterprise Ltd v Attorney-General* [1995] 3 NZLR 293 in which it was held that forfeiture under the Fisheries Act 1983 allowed the Minister to dispose of the ship under section 107C(1) free of any existing encumbrances (in that case, a registered ship mortgage). According to Young J, "disposal" of a ship under section 107C(1) differs from "release" of a ship under section 107C(2). In the latter instance, the property released back to the owner is the same property that became forfeit. Therefore, all pre-existing legal and equitable interests in the property revive on release.

In a second lengthy judgment, his Honour held that the sale agreement entered into between Karelrybflot and Kareltrust was voidable under section 60 of the Property Law Act 1952 as being an alienation of property in an attempt to defraud creditors, on a number of grounds. Young J thought that it could be inferred that the parties knew that *in rem* claims might be enforced against the ships when they were redeemed, and that a prior "sale" would provide an additional defence to those claims. For Kareltrust, the transaction was at best a financing arrangement and that there had been no real change to the ships or their operation by reason of the sale – the sale had not been registered in Russia and the relevant ship mortgages had not been discharged or amended. Karelrybflot continued to behave as if it were the owner of the ships until proceedings *in rem* were brought. The sale agreement expressly dealt with crew members' and mortgagees' existing claims, but not other statutory *in rem* claims; an omission which, in this context, appeared deliberate. His Honour concluded (at 35):

that the purpose of the present application to set aside the *in rem* proceedings is to create a situation in which Karelrybflot can deploy, against Wallace and Cooper, commercial arguments based on a practical inability to enforce in New Zealand any judgment which might ultimately be obtained. I can see no other practical reason why Kareltrust should have incurred the expense which it has in respect of the present proceedings given the complete indemnity which it is entitled to from Karelrybflot under the sale agreement and, given as well, the absence of any arrest. Indeed, I see no reason why the April 1998 arrangements were entered into in the form in which they were unless this was the intention.

As is perhaps apparent from my review of the facts, I am sceptical whether the legal documentation put in place by Russell McVeagh McKenzie Bartleet and Co represents the bargain as acted upon by Kareltrust and Karelrybflot.

Having found that the agreement was entered into with the intent to defraud creditors, Young J held that Karelrybflot should be regarded as the beneficial owner of the ships at the time when the actions were brought, and therefore dismissed the application to set aside the proceedings. (See *Wallace & Cooper Engineering Ltd v FV Orlovka* (HC Christchurch, AD 93-99/98, 19 July 1999); and *Wallace & Cooper Engineering Ltd v FV Orlovka* (HC Christchurch, AD 93-99/98, 20 August 1999), summarised by the Court of Appeal in *Wallace & Cooper* at 405-408.)

On appeal, the Court agreed with Young J's analysis of the effect of forfeiture under the Fisheries Act 1983 and with the distinction drawn between the effect of "disposal" of the forfeited property under section 107C(1), and "release" under section 107C(2). The Court confirmed its earlier decision in *Equal Enterprise* where it had held that forfeiture

under section 107B extinguishes not just ownership interests in the vessel, but all other pre-existing interests in the ship, so that the Crown is free to “dispose of [the forfeited] property as the Minister thinks fit” under section 107C(1). By comparison, however, the Court said (at 412) that the effect of release of a ship under section 107C(2) is to restore ownership to the owner (and only the owner) at the time of forfeiture:

The status quo ante returns. The mortgages, claims and other interests are likewise restored. It would be extraordinary if they were not. It would create a considerable anomaly, not to say unfairness and hardship, if an owner could pay the Crown a perhaps modest “redemption fee” and thereby obtain release of an unencumbered vessel. The personal debts would remain but the owner would be in a position to sell the vessel without accounting to the creditors.

Applying this analysis of section 107C(2) to Wallace & Cooper’s statutory claims in rem, the Court held that, like a mortgage over the vessel, statutory claims in rem revive on release from forfeiture. The Court addressed two possible scenarios. First, where an action in rem had been brought prior to forfeiture, “although the Crown took the vessel free from the rights of the claimant in relation to the vessel, the in rem claim could be pursued once there was a redemption”. Second, even where an action in rem had not been brought prior to forfeiture, it might be commenced after the vessel was released to its owner under section 107C(2), provided that the requirements of section 5(2)(b) of the Admiralty Act were met, in other words, provided that the ship remained in the same beneficial ownership as before forfeiture. This was because (at 413):

The ability to proceed in rem ... piggybacks upon the proceeding in personam. It is a remedial procedure or enforcement right; it does not arise until invoked, and therefore when the forfeiture happened there was no proprietary interest to be extinguished by it, not even an inchoate right, such as exists immediately when circumstances have occurred giving rise to a seaman’s maritime lien.

The Court of Appeal held, however, that it had not been established that Karelrybflot remained the beneficial owner of the ships at the time when Wallace & Cooper’s actions were brought. The Court noted that the effect of section 60 of the Property Law Act 1952 is to render an alienation of property with the intent to defraud creditors “voidable at the instance of the person thereby prejudiced”, and that the transaction is to be treated as having been set aside only upon the making of an order declaring that it is avoided, or upon the creditor’s manifesting an election to avoid the transaction (see *Shears v Rogers* (1832) 3 B & Ad 362; *Re Mouat* [1899] 1 Ch 831; *Harrods Ltd v Stanton* [1923] 1 KB 516; *Brady v Stapleton* (1952) 88 CLR 322). Here, said the Court, there was no manifestation of an election to avoid the transaction prior to bringing its actions in rem. There could hardly be, as the plaintiff was unaware of the sale agreement between Karelrybflot and Kareltrust until after the actions had been brought! As a consequence, at the moment when proceedings were filed, the transfer of title to Kareltrust still stood, the requirements of section 5(2)(b) of the Admiralty Act were not met, and the Court thus had no jurisdiction to hear the in rem proceedings. The Court therefore found it unnecessary to express its view on whether the agreement between Karelrybflot and Kareltrust was entered into with the intent to defraud creditors, and set aside Wallace & Cooper’s in rem proceedings.

The Court's decision in *Wallace & Cooper* highlights the inadequacies of the forfeiture provisions in section 107 of the Fisheries Act 1983. Given the potential legal complexity and range of third party interests that might be seriously affected by forfeiture and release of vessels, it seems highly appropriate that the application for release from forfeiture should be a matter for judicial determination, rather than Ministerial discretion. Furthermore, it seems desirable that all third party interests are fully considered and determined by a court *before* the vessel is released from forfeiture, to ensure that legitimate pre-forfeiture interests are not unjustly thwarted by secret arrangements entered into by an owner during the forfeiture period. This is particularly so because third parties cannot protect their position by commencing in rem proceedings during that period. In this regard, the forfeiture provisions of the Fisheries Act 1996, which provide for the District Court or High Court to determine applications for release from forfeiture in accordance with detailed statutory criteria, represent a step in the right direction (see section 62 relating to forfeiture of quota, and section 256 relating to forfeiture of property (the latter section is not yet in force at the time of writing)).

As regards the Court's conclusion that a ship mortgage revives on release of the ship to its owner under section 107C(2) of the Fisheries Act 1983, it should be pointed out that practical problems might arise in this regard where the forfeited ship is registered in New Zealand. In *Equal Enterprise*, the Court of Appeal noted that there was no express provision in the Ship Registration Act 1992 for correcting entries in the ship register following forfeiture of a New Zealand-registered ship, and had to refer to the Registrar's general powers under section 61 of the Act. As a consequence of the decision in *Equal Enterprise*, the Ship Registration Act was amended in 1999. Section 45 of the Ship Registration Act, as amended, now requires the Registrar to record in the register that the mortgage has been extinguished as soon as possible after receiving the Court's forfeiture order. Because the new section 45 was drafted with disposal of the ship under section 107C(1) in mind, however, it does not expressly provide for the automatic re-registration of ship mortgages when the security interest revives on release by the Minister of Fisheries under section 107C(2). Until pre-forfeiture ship mortgages have been re-registered, they create only an equitable interest in the vessel, the priority of which may be affected by legal mortgages registered by third parties in the interim. The Ship Registration Act also does not expressly deal with the issue of the order of re-registration of interests after release from forfeiture. It could be argued in the light of the Court of Appeal's statements in *Wallace & Cooper* that the Registrar is obliged to re-register interests according to their original priority in order to preserve the status quo ante. On the other hand, however, the plain wording of section 39 of the Act suggests that the Registrar is required to re-register pre-forfeiture ship mortgages on a first lodged, first registered basis. The Ship Registration Act should therefore be amended to ensure that registered pre-forfeiture interests are appropriately and automatically re-registered on the ship's release from forfeiture.

Finally, the Court's general conclusion in *Wallace & Cooper* that a pre-forfeiture statutory right of action in rem which is enforced by bringing an action in rem *after* release is not affected by the intervening forfeiture, seems entirely correct. Provided that the plaintiff can meet the in personam link in section 5(2)(b) of the Admiralty Act at the time when its right of action arose and when the action is brought, the intervening transfer of ownership to the Crown and back to the owner would seem to be neither here nor there.

However, the Court's unargued assertion (at 413) that, where the relevant in rem action has been brought *before* forfeiture, the Crown nonetheless would take the vessel "freed from the rights of the claimant in relation to the vessel", seems questionable. It is suggested that the outcome of a situation involving a direct clash between the admiralty jurisdiction and the forfeiture jurisdiction of the Fisheries Act is not at all clear-cut. In *Readhead v Admiralty Marshal, Western Australia District Registry* (1998) 157 ALR 660 (FCA), where a fishing vessel was arrested by the mortgagee bank after it had been apprehended and detained by Australian fisheries officials, but before an order of forfeiture under the Fisheries Management Act 1991 (Cth) had been issued, the Court declined to rule that the title acquired by the ship's subsequent sale under the admiralty jurisdiction would be affected by the Crown's rights to detention and subsequent forfeiture. The Court noted (at 675-676) that, when it enacted the Fisheries Management Act 1991, the Australian legislature must have been aware "of the wide-ranging powers, including a power of sale, possessed by Courts of Admiralty", and that neither the Fisheries Management Act nor the Admiralty Act expressly provided which jurisdiction would override the other. The Court concluded that the legislature intended to leave to the Admiralty Court a discretion to adjust "the competing rights of the authorised officer under the [Fisheries Management] Act on the one hand, and of the plaintiff in an action in rem and other persons interested in the resolution of that action on the other". As a consequence of this decision, the Fisheries Legislation Amendment Act (No 1) 1999 (Cth) was enacted to amend the Fisheries Management Act, which now expressly provides that enforcement action and forfeiture under the Fisheries Management Act takes precedence over any admiralty proceedings.

The relationship between the admiralty jurisdiction and the detention and forfeiture provisions of the Fisheries Acts is equally unclear in New Zealand. The introduction of an express statutory provision spelling out the jurisdictional hierarchy in respect of ship forfeiture would seem to be a sensible precaution.

Seafarers' Wages Claims

In *Udovenko*, which concerned the same ship forfeitures as *Wallace & Cooper*, the Court of Appeal upheld several in personam claims brought against Karelrybflot by the Russian crews of the forfeited ships in respect of unpaid wages, general damages for failure to pay wages and the cost of their repatriation to Russia, and confirmed a declaration obtained from the High Court that they had maritime liens in relation to those claims.

Karelrybflot argued that the seafarers' employment contracts had been frustrated by the forfeiture, and that the Court sitting in admiralty did not have jurisdiction to apply the Minimum Wage Act 1983, because section 10(2) of that Act provides that all Minimum Wage Act proceedings "shall be commenced in the Employment Tribunal". The Court held that, whilst the doctrine of frustration was applicable to employment contracts, it was not to be lightly invoked, and found by a 4-1 majority (Gault J dissenting) that the crews' employment contracts had not been frustrated here.

In respect of the application of the Minimum Wage Act, the Court held (at 35-36) that section 10(2) of the Act had been enacted to ensure consistency with the generally

exclusive jurisdiction of the Employment Tribunal and Employment Court in respect of claims for wages, but that it cannot have been intended “that in order to be able to claim a minimum wage a seaman must forgo the benefit of an in rem proceeding, one of ancient origin and serving a protective function, in order to bring a proceeding in the Employment Tribunal”. A contrary finding would clearly have been absurd, but the Court’s reasoning is not entirely satisfactory. It is not supported by close analysis, and does not examine the issue of whether, or to what extent, the Minimum Wage Act was intended to have extra-territorial effect. (See also B Robertson, *Karelrybflot v Udovenko* [March 2000] Employment Law Bulletin 33.) The jurisdiction provisions of the Minimum Wage Act, the Holidays Act 1981, the Wages Protection Act 1983, and the Employment Relations Act 2000 should be tidied up to refer expressly to the existing admiralty jurisdiction in respect of wages claims.

The employment woes of these seafarers, and of other unpaid foreign fishing crews in recent years, may yet have a legislative sequel. The Foreign Fishing Crew Wages and Repatriation Bond Bill 2000 was introduced into Parliament in June 2000 and is still at the Select Committee stage at the time of writing. If enacted, the Bill will create a fund from a bond, or equivalent guarantee by way of an insurance policy, to cover wages and the cost of crew repatriation if the operator or notified user of the vessel fails to fulfil its employment obligations in this regard while the vessel is fishing in New Zealand fisheries waters. The Bill provides for the Chief Executive of the Ministry of Fisheries to pay wages to affected foreign crew members at the minimum adult wage under the Minimum Wage Act.

Forfeiture (Again)

In addition to considering the seafarers’ in personam wages claims, the Court of Appeal in *Udovenko* held (at 26, emphasis added) that the High Court’s declaration that the seafarers’ wages claims enjoyed maritime lien status was correct:

Section 5(1) of the Admiralty Act enables the admiralty jurisdiction of the High Court to be invoked by an action in rem in any case in which there is a maritime lien on any ship for the amount claimed. It follows from the decision in *Kareltrust* that a *maritime lien survives the process of forfeiture and release*. Unlike a statutory in rem claim under s 5(2), a maritime lien follows the ship in respect of which services are rendered and is not defeated by a change of ownership. It is not possessory in nature; the claimant seaman does not need to have remained with the ship.

The highlighted statement raises an important jurisprudential issue, and it is frustrating that the Court did not elaborate on its reasoning. Does this statement mean that the Court was of the view that maritime liens survive *both* forfeiture and release? At first glance, one would assume not, for this is the same Court that, in *Wallace & Cooper* at 411, confirmed its earlier decision in *Equal Enterprise* to the effect that section 107C of the Fisheries Act proceeds on the premise that “property has passed to the Crown” on forfeiture; that forfeiture “extinguishes all ownership interests, including security interests in the vessel”; and that “the Crown had ownership of the vessel free of security interests”.

Consistent with these dicta, one would assume that maritime liens are also extinguished on forfeiture to the Crown.

However, there are three factors which suggest that the Court was of the view that maritime liens are not extinguished on forfeiture. First, whilst the Court consistently refers in *Wallace & Cooper* to ownership rights, mortgages and other statutory claims being *restored* or *revived* on release, it refers here to maritime liens as *surviving* forfeiture and release. Second, the Court refers to the fact that the maritime lien follows the ship and is not defeated by subsequent changes of ownership (even to the Crown?). This echoes the Court's reference in *Wallace & Cooper* at 413-414 to the distinction drawn between maritime liens and statutory claims in rem in *The Heinrich Bjorn* (1885) 10 PD 44:

[A] maritime lien arises the moment the event occurs which creates it; the proceeding in rem which perfects the inchoate right relates back to the period when it first attached: "the maritime lien travels with the thing into whosoever possession it may come": *The Bold Buccleugh* [(1851) 7 Moo PC 267, 284, 285]; and the arrest can extend only to the ship subject to the lien. But, on the contrary, the arrest of a vessel under the statute is only one of several possible alternative proceedings ad fundandam jurisdictionem; no right in the ship or against the ship is created at any time before the arrest; it has no relation back to any earlier period; it is available only against the person who [is liable in personam]; and the arrest need not be of the ship in question ... The two proceedings, therefore, though approaching one another in form, are different in substance: in the one case the arrest is to give effect to a pre-existent lien, in the other, the arrest is only one of several alternative modes of procedure ...

Although this quotation was used in *Wallace & Cooper* to illustrate the nature of statutory rights of action in rem rather than maritime liens, the Court would seem to agree with the conceptualisation of the maritime lien in *The Heinrich Bjorn* and *The Bold Buccleugh*. Third, the Court notes (at 26) that, if the seafarers' wages claims had been based solely on their statutory right of action in rem for wages under section 4(1)(o) of the Admiralty Act 1973 rather than the maritime lien, this could have been an issue, not merely because of the subsequent sale to Kareltrust, but also because the seafarers had "commenced their proceedings before the release of the ships from forfeiture". The necessary inference seems to be that it was the maritime lien that provided the basis for the seafarers' in rem actions brought against Karelrybflot while the ships were still forfeit to the Crown, because their rights under the maritime lien had survived forfeiture. (If this is the correct inference to be drawn from the Court's remarks, it is, of course, deeply problematic. An action in rem brought to enforce the seafarers' maritime lien while the ships were still forfeit to the Crown would have affected the Crown as the current owner of the vessel, not Karelrybflot, and the action should have been barred by section 28 of the Crown Proceedings Act 1950.)

If this analysis is correct and the Court is of the view that maritime liens survive forfeiture, this has several interesting consequences. For a start, to use the Court's metaphor in *Wallace & Cooper*, unlike ship mortgages and other statutory actions in rem, maritime liens do not piggyback on in personam liability. Maritime liens arise independently, automatically and by operation of the law, and can be enforced against the relevant ship regardless of whether there is an in personam obligation between the lienholder and the current owner of the ship. If maritime liens do survive forfeiture,

therefore, their existence cannot be grounded in any personal right or obligation outside the ship. Logically, they must *attach as a real right* (albeit as an “inchoate” real right if an action in rem to enforce the lien had not been brought before forfeiture) *to the ship itself throughout the forfeiture period*, and in so doing, they must necessarily affect the property which passes to the Crown. As Gorrell Barnes P pithily put it in *The Ripon City* [1897] P 226, 242, a maritime lien is “a right acquired by one over a thing belonging to another – a *jus in re aliena*. It is, so to speak, a subtraction from the absolute property of the owner in the thing.” If the Crown does take the forfeited property subject to pre-existing maritime liens, this suggests not only that property released back to the owner under section 107C(2) must be subject to the same maritime liens (which would seem to accord with the Court’s view in *Wallace & Cooper* that the effect of release is to restore the status quo ante), but also that title granted by the Crown to a third party on disposal of the forfeit property under section 107C(1) is similarly affected.

It must be said that this interpretation of the Court’s statement that “a maritime lien survives the process of forfeiture and release” seems impossible to square with the Court’s decision in *Equal Enterprise*, unless that decision is artificially read down as referring only to mortgages and other statutory rights in rem. It would also seem at odds with basic statutory interpretation principles and the policy considerations underpinning the forfeiture jurisdiction. As Sullivan, “Forfeiture of Fishing Vessels in Australia and New Zealand” (1999) 14/1 *Maritime Law Association of Australia and New Zealand Journal* 39, 70-71, argues, the decision in *Equal Enterprise* makes it clear that forfeiture:

constitute[s] a transfer to the Crown of the res rather than the title or other interest of the defendant. Such a transfer, if the decision in *Equal Enterprise Ltd* is correct, is on the basis that the Crown obtains free and unencumbered title. It would be inconsistent with the legal nature of forfeiture ... that pre-existing maritime liens ... continue to subsist in the res but cannot be asserted while the res is property of the Crown or foreign sovereign. The only means by which the Crown can obtain unencumbered title is if, on forfeiture, any maritime lien ... is extinguished. If extinguished, it cannot then be resurrected ...

However, as foreshadowed in the final sentence of the above quotation, the alternative interpretation of the Court’s Delphic utterance – namely, that maritime liens are extinguished on forfeiture but are resurrected on release of the property to its owner – is equally problematic. Ship mortgages and other statutory rights of action in rem can be revived after release from forfeiture, provided that the ship remains in the same beneficial ownership, precisely because of the link with the underlying in personam obligation on which the in rem right of action piggybacks. So, for example, although the security right created by a registered ship mortgage is extinguished by forfeiture, the underlying contractual obligation remains between the parties (see *Equal Enterprise* at 296), and can be used as the basis for re-registration of the security right and its enforcement by an action in rem.

By contrast, as noted above, a maritime lien is a “real” real right (in the terminology of *The Ripon City*, a *ius in re*, rather than just a *ius in rem*). It attaches to the ship itself. If maritime liens attaching to the ship are extinguished by forfeiture there is, therefore, no basis for their revival on release. It might perhaps be argued that the statutory relief provision in section 107C(2) creates a “contingent interest” from which a maritime lien can

be re-created (see *Equal Enterprise* at 297-298, referring to *Williams v Attorney-General* [1990] 1 NZLR 646, 672), or that a Ministerial power to re-create maritime liens is inherent in the statutory power to grant relief under section 107C(2). However, these arguments would not seem to bear close scrutiny. Bleak and unattractive though it may be, this conclusion seems inescapable: for maritime liens there can be no life after forfeiture, and no hope of resurrection.